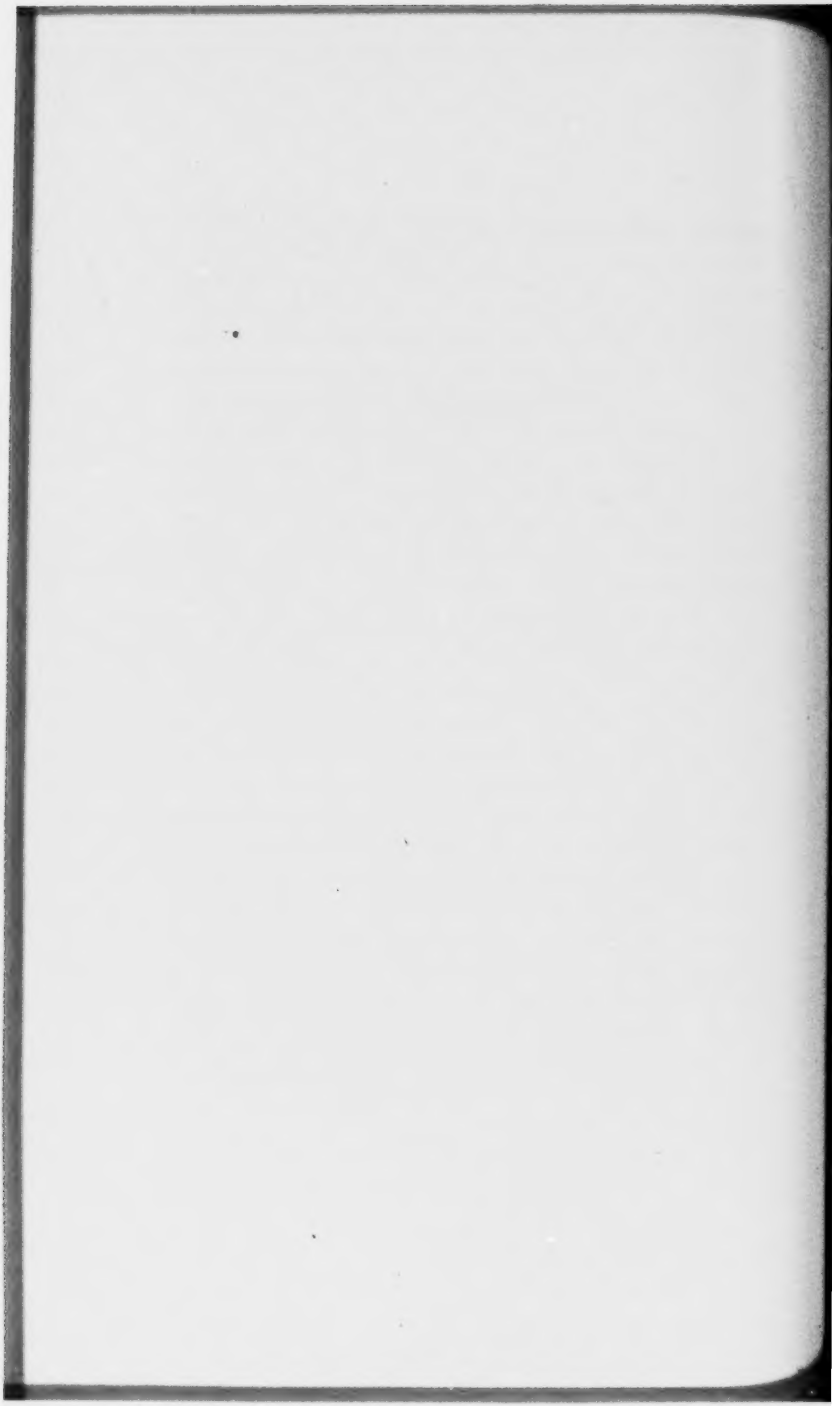

SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

CHARLES LOUGHREY AND MILES H. WHEELER,
Defendants in Error.

ABSTRACT OF THE CASE.

Plaintiff sued defendants in error in trover for timber cut from the north half of the northwest quarter, the northwest quarter of the northeast quarter and the southeast quarter of Section Thirteen (13), Township Forty-four (44), North of range Thirty-five (35) West, in the State of Michigan.

Defendants in error being residents of the eastern district of Wisconsin, the suit was instituted in the United States Circuit Court for that district.

The summons was issued August 30, 1890.

The complaint charges the *cutting* of the timber by one Joseph E. Sauve. It charges him also with having removed from the lands, of the timber so cut, 80,000 feet and with having left skidded upon the lands the balance.

The defendants in error are charged as purchasers from Sauve.

The entire amount of timber cut by Sauve is alleged in the complaint to be 600,000 feet and the time of the cutting was alleged to have been in the winter of 1887-8 and prior to the 1st day of March, 1888.

The defendants in error by their answer, admit that they purchased from Sauve, about the time stated in the complaint, a quantity of timber in the log not to exceed 400,000 feet board measure, but allege that all of such timber was cut from the two descriptions of land first mentioned in the complaint, namely:—the north half of the northwest quarter and the northwest quarter of the northeast quarter of the section there named, and from the southeast quarter of the northeast quarter of the same section, instead of from the southeast quarter of said section as alleged in the complaint.

By stipulation the case was tried by the court without a jury, upon stipulated facts.

The facts stipulated are found in folios 6 to 9, pages 4 to 6, of the Transcript of Record.

The stipulation determines the descriptions of land from which the timber was cut to be as described in the answer and the amount cut to be 400,000 feet. It also fixes the value of the timber as stumpage, as logs upon the land, as logs upon the river and as manufactured, as data for determining the damages in case the court should determine the government was entitled to recover.

It was also stipulated that the cutting and taking of the timber was prior to March 1st, 1888, and was not a willful trespass: that none of the lands in question were ever owned or held as a homestead or earned by any railroad or other company under

the act of Congress of June 3, 1856, mentioned in the stipulation of facts, and that the history of the Ontonagon & State Line Railroad Grant marked Exhibit "A" (mentioned in third paragraph of stipulated facts, p. 6, Record) might be used as evidence as far as applicable to the case.

The main facts upon which the defense to the action is based are stated in the Fifth paragraph of stipulated facts, p. 5, Record, which reads as follows:—

> "Fifth;—That the lands above described "were a part of the Grant of Lands made "to the state of Michigan by an act of the "Congress of the United States, approved "June 3, 1856, being Chapter 44 of Volume "II, of the United States Statutes at large, "and that said lands were accepted by the "state of Michigan by an act of the Legis- "lature, approved February 14, 1857, be- "ing Public Act No. 126 of the Laws of "Michigan for that year, and were a part "of the lands of said Grant within the six "mile limit, so called, outside of the com- "mon limits, so called, certified and ap- "proved to said state by the Secretary of "the Interior, to aid in the construction of "the railroad mentioned in said Act No. "126 of the Laws of Michigan of 1857, to "run from Ontonagon to the Wisconsin "State Line, therein denominated "The "Ontonagon and State Line Railroad Com- "pany."

After the trial the court found the facts to be as stipulated: pp. 7 and 8, Record and, found as Conclusions of Law,

> "First:—That the cause of action sued

"on in this case did not, at the time of the "commencement of this action, and does "not now, belong to the United States of "America.

"Second:—That the defendants are en- "titled to judgment herein for the dismis- "sal of the complaint upon its merits."

The history of the Ontonagon & State Line Railroad Grant referred to in the thid paragraph of stipulation on page 6 of the Record, and there stipulated as evidence in the case, is not shown by the record. No bill of exceptions was settled in the case and what figure this history cut at the trial does not appear.

No exceptions were filed to the Court's Findings of Fact. Its Conclusions of Law and what it failed to find are excepted to, but no requests to find were made.

The trial court reached the conclusion that the cause of action sued on did not belong to the government and rendered judgment for the defendants, and the Court of Appeals affirmed the Judgment.

There was a mis-recital of fact in the printed brief for plaintiff in error in the Court of Appeals as follows:

"On February 22, 1867, the Legislature "of the state of Michigan passed a joint "resolution, (Mich. Laws, 1867, p. 613,) "surrendering the lands, and authorizing "the Governor to execute and file a cer- "tificate of non-incumbrance, and surren- "der the said lands to the United States."

It will be found upon examining the act of the legislature of Michigan above referred to that it

has no reference whatever to any of the lands composing any part of the grant to "The Ontonagon & State Line Railroad Company." The joint resolution there referred to has reference entirely to the grant to the "Marquette & State Line Railroad Company," an entirely different corporation. This was so held by this Court in the case of *Lake Superior Ship Canal R'y & Iron Co. v. Cunningham*, 155 U. S. 354, where the resolution is quoted as follows:

> "*Whereas*, by act of congress, ap-
> "proved June 3, 1856, there was made,
> "among other grants to this state, a grant
> "of land to aid in the construction of a rail-
> "road from Marquette to the Wisconsin
> "state line; and whereas, by joint resolu-
> "tion of congress, approved July fifth,
> "eighteen hundred and sixty-two, a change
> "of the route of said road was authorized,
> "and in fact has been made; and whereas,
> "the company have executed a release of
> "said land to the governor; therefore,
>
> "Resolved by the senate and house of
> "representatives of the state of Michigan,
> "that the governor be and is hereby au-
> "thorized to execute and file the certificate
> "of non-incumbrance and surrender to the
> "United States of the land on the original
> "line of said railroad, required by said
> "joint resolution."

Argument for Defendants.

The lands in question were a part of those granted by the Act of Congress of June 3, 1856, to the state of Michigan and accepted by that

state by the Act of the Legislature approved Feb'y 14, 1857, and were a part of the grant "within the six mile limit, so called, outside of the common limits, so called." approved to the state to aid in the construction of the railroad mentioned in the Act of Michigan above referred to to run from Ontonagon to the Wisconsin state line and denominated in said Act "The Ontonagon & State Line Railroad." Being such, they were, to that extent, in all respects in the same situation as those considered in the case of *Lake Superior Ship Canal Railway & Iron Co. v. Cunningham*, supra. That case contains a full history of that part of the grant of June 3, 1856.

Were it not for the Act of Congress of March 2, 1889, (25th Statutes at large, 1008) which declares a forfeiture of lands, with certain exceptions, co-terminous with the uncompleted portion of the railroad in aid of which the grant of 1856 was made, this case would be wholly controlled by *Schulenberg v. Harriman*, 21 Wall., 44, for the trespass complained of, having been committed prior to the 1st day of March, 1888, and while the title to the land was out of the government, the cause of action was not in the government. That case is exactly in point.

Nor would the act of March 2, 1889, if, it, instead of declaring forfeiture, as it does, of but a *portion* of the unearned lands of the Ontonagon Grant, had declared forfeiture of *all*, have invested the government with the cause of action for this trespass. It does not purport to do more than resume title *to the lands*. The cause of action for the trespass remained where it was at the time it accrued: *Cutts et al. v. Spring et al.*, 15 Mass., 134; *DePeyster v. Michael*, 6 N. Y.,

467–506. To use the words of the opinion in *Lake Superior Ship Canal R'y & Iron Co. v. Cunningham*, supra—page 112—

> "The first section simply declares a for-
> "feiture of the lands opposite to and co-
> "terminous with the uncompleted portion
> "of any railroad in aid of which the grant
> "of 1856 was made. So far as the parties
> "to this controversy are concerned, that is
> "the whole significance of the section.
> "As to them it grants nothing and with-
> "draws nothing. And as, at the time of
> "the passage of the act neither settler nor
> "company had any right or title to the
> "lands, if this were the only section it
> "would operate simply to resume the title
> "to the United States: clear the lands of
> "all pretense of adverse claims, and add
> "them to the public domain to be there-
> "after disposed of as other public lands
> "are disposed of. The second and third
> "sections are the troublesome parts of the
> "Act etc."

The title to the instant lands having by the Act of Congress of June 3, 1856, and Public Act No. 126 of the Laws of Michigan of 1857, vested in the State of Michigan, the government, since it founds its right to maintain this action upon the Forfeiture Act of Congress of March 2, 1889, a statute containing a general clause and exceptions, should have shown, both by its pleading and proof, that these lands were not a part of those excepted from the operation of the general clause. *McGlone et al. v. Prosser*, 21 Wis., 275; 1 Chitty's Pl. 223; *Vavasour v. Ormond*, 6 B. & C. 430 (13 E. C. L. 225); *Smith v. Moore* 6 Greenl., 227;

Ross et al. v. Duval et al., 13 Pet., 45; But it makes no attempt by its complaint to show this, and the stipulated facts do not cover all of the exceptions of the act.

But for aught that appears in the case, these lands were amongst those saved from the forfeiture by the second or third sections of the Act itself. The burden was on the plaintiff to show they were not. Title to the land and cause of action once appearing to be out of the government, to maintain this action it was incumbent upon the government to show itself reinvested with both. It has shown neither. Its sole reliance is the first section of the forfeiture act of 1889, and that section, as the act was construed in the Cunningham case, does not, necessarily, relate to these lands, They may, for aught that appears, be amongst those confirmed to adverse claimants by the 2nd or 3rd sections of the act. All that appears is

1st: They were never owned or held by any party as a homestead, and

2nd: They were never earned by any railroad or other company *Under the Act of Congress of June 3rd, 1856.*

These are not, however, the only exceptions. They may otherwise "have been heretofore disposed of by the proper officers of the United States or under selections in Michigan, confirmed by the Secretary of the Interior, under color of the public land laws." Sauve, who cut and sold the timber to defendants, may have had "a bona fide pre-emption claim on the 1st day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States." In either case the Act of 1889, (Section

3) confirmed, instead of forfeited the title. This was so held in the Cunningham case.

W. H. WEBSTER,

Att'y for Defendants.